STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2010
v	No. 290018 Kalamazoo Circuit Court
ADARIUS DEPRIEST FERGUSON, Defendant-Appellant.	LC No. 2008-000897-FH

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of delivery or manufacture of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two years in prison for the felony-firearm conviction. We affirm.

Deputy Sheriff Hiemstra and Investigator Elzinga, dressed in plain clothes, went to an apartment in Kalamazoo for a "knock and talk." They did not have a warrant. Mike Fuller answered the door, and Hiemstra and Elzinga identified themselves as policemen. Fuller agreed to let them inside, where they encountered defendant. Hiemstra and Elzinga explained that they were investigating drug trafficking and asked for consent to search the apartment. Defendant and Fuller declined. However, during their conversation, Elzinga noticed two marijuana stems on a dining room table. Based on this observation, Hiemstra and Elzinga contacted Kalamazoo police officers Ghiringhelli and Millard, who arrived to secure the apartment while Hiemstra and Elzinga left to obtain a search warrant. Defendant was free to stay or leave during this period, and he chose to leave, though he eventually returned. Hiemstra and Elzinga obtained the search warrant and returned to search the apartment with Ghiringhelli and Millard. Ghiringhelli found a shoebox beneath a bed in the southeast bedroom. Inside the shoebox, he found a plastic baggie containing 15 grams of cocaine, other drug paraphernalia, and three documents containing defendant's name. Millard searched the closet in the southeast bedroom and found an assault rifle on the floor, a loaded magazine clip folded inside some clothing, a single bullet, and a box containing defendant's social security card, birth certificate, and immunization records. At some point after Ghiringhelli found the shoebox under the bed, but before Millard found the rifle, Hiemstra talked with defendant, who had returned to the area and was on a stairwell in the hallway outside the third-floor apartment. Defendant admitted that the shoebox had been in his possession, but claimed that he was holding it for a man named "Lil Mike" in St. Louis. At some point, defendant indicated that he had lived in the apartment for two or three months. When

Hiemstra learned about the rifle, he confronted defendant, who denied having any knowledge of it and then indicated that he did not want to answer any more questions. Hiemstra stopped asking questions and arrested defendant shortly thereafter. Once in custody, defendant was brought inside the apartment, where he asked Millard about another larger bag of white powder that had been found inside the apartment.[1] Millard did not respond, at which point defendant apparently stated, "Man, I'll tell you right now that what you found in my room is mine, I'm not catching some other charges for what you found." Millard asked defendant which room was his, and defendant nudged his head toward the southeast bedroom.

Defendant argues that there was insufficient evidence to sustain his felony-firearm conviction. Specifically, he challenges the element of possession. We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). The trier of fact, not this Court, determines what inferences may be drawn from the evidence and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Questions of credibility and state of mind are also for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.227b provides in pertinent part that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years." Possession of a firearm can be actual or constructive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). While proximity of a weapon alone is insufficient, constructive possession of a firearm exists when a defendant knows the location of a weapon and it is reasonably accessible to him. *Id.* at 470-471. Stated another way, "[a] person has 'possession' of a weapon when it is 'accessible and available. . . at the time the crime is committed.'" *People v Williams*, 198 Mich App 537, 541; 499 NW2d 404 (1993), quoting *People v Terry*, 124 Mich App 656, 662; 335 NW2d 116 (1983). Hence, physical possession is not necessary for the crime of felony-firearm. See *Hill*, 433 Mich at 471.

In this case, the evidence clearly showed that defendant admitted to living in the southeast bedroom for the preceding two or three months, and that a rifle and loaded magazine were found in the closet of that bedroom. The investigators found defendant's personal documentation in the closet near the gun. Defendant later admitted to owning items found in the bedroom. Moreover, the rifle was found within a few feet of the box containing cocaine and drug paraphernalia. On this record, viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to enable a rational trier of fact to

[1] Ghiringhelli found a bag containing a white substance in the southwest bedroom. He and Millard photographed the evidence and brought it into the living room for processing. A later laboratory test indicated that the bag contained 58.27 grams of sodium carbonate, not cocaine.

conclude beyond a reasonable doubt that defendant had constructive possession of the rifle, i.e., that defendant knew its location and it was readily accessible to him at the time he committed the underlying felony. *Id.* at 470-471.

Next, defendant argues that the prosecutor improperly elicited testimony from Hiemstra that defendant asserted his Fifth Amendment right to silence. Defendant also challenges a similar reference Hiemstra made during cross-examination. Defendant claims that these references violated his due process rights. Because defendant did not object to the alleged errors below, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

"When a defendant exercises his right to silence, his silence cannot be used against him at trial." *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). However, a defendant's "constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda*[2] warnings have been given." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). The Constitution does not protect a defendant's right to silence unless he asserted that right during a custodial interrogation situation, or after his *Miranda* rights were given. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Here, when the prosecutor asked Hiemstra what defendant said when confronted with evidence of the rifle, Hiemstra responded, "I asked him if he had any knowledge of the firearm in his room and he stated that he did not; and then he did not wish to answer any more questions and none more were asked." On cross-examination, defense counsel asked Hiemstra if defendant was free to leave at that point, to which Hiemstra replied, "Once I made the determination that a rifle was found and I—in talking to him, he didn't want to talk anymore[.]" Defense counsel subsequently asked, "He tells you, I don't want—I don't have anything else I want to say to you, right?"

The record clearly indicates that defendant was not under arrest and had not been read his *Miranda* rights before asserting his silence. Thus, the issue is whether defendant asserted his right to silence in a custodial interrogation situation. See *McGhee*, 268 Mich App at 634. As this Court has stated:

> The term "custodial interrogation" means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, [384 US at 444]. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

L Ed 2d 293 (1994). [*People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).]

The focus is on the defendant's understanding of the situation, and not information shared between officers concerning the defendant's freedom to leave. *Id.* at 450; see also *Stansbury*, 511 US at 323-324.

In the present case, the record established that Hiemstra told defendant he was not under arrest throughout the duration of the search and during their conversation about the items recovered in defendant's bedroom. Hiemstra stated that defendant was free to leave at any point, and indeed told this to defendant. Defendant in fact left two or three times during the search. When defendant returned to the apartment and talked with Hiemstra, defendant stayed outside the apartment, on a stairwell in a hallway. From defendant's own actions, it is clear that defendant objectively believed that he was free to leave the apartment while the investigators searched inside. Thus, defendant was not in custody when he indicated that he no longer wanted to talk with Hiemstra. *Zahn*, 234 Mich App at 449. As such, his Fifth Amendment right to silence had not yet attached, and any reference to his statement was not improper. *McGhee*, 268 Mich App at 634. The challenged statements were not an impermissible reference to defendant's constitutional right to silence, and did not deny defendant a fair trial. We perceive no plain error.

Defendant also argues that his trial counsel was ineffective for failing to object to Hiemstra's testimony. However, because the challenged testimony concerning defendant's silence was not improper, any objection by defense counsel would have been futile. It is well settled that counsel is not ineffective for failing to raise a meritless or futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defense counsel's performance in this regard did not fall below an objective standard of reasonableness. *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering